83-720

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. _____

HUMPHREYS (CAYMAN), LTD.

and

HOLIDAY INNS, INC.

Petitioners,

v.

VICTORIA A. LEHMAN, as EXECUTRIX OF THE ESTATE OF ROBERT WAYNE LEHMAN, DECEASED

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding the Trial Court abused its discretion in dismissing the action on the grounds of *forum non conveniens* when the lower court considered all relevant public and private interest factors found in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and its balancing of these factors are reasonable.

2. Whether the Court of Appeals erred in relying upon the standards used to determine the constitutional limits of extra-territorial service of process upon nonresidents ("minimum contacts" tests) in reviewing a lower court's dismissal on the grounds of *forum non conveniens*.

3. Whether the Court of Appeals erred in ruling that Iowa law probably applied to plaintiff's warranty claims precluding dismissal on the basis of *forum non conveniens* when the record reflects the contract was entered into and performed in Grand Cayman.

4. Whether the Court of Appeals erred in placing substantial weight upon the unavailability of contingent fees in Grand Cayman as justification for its overruling the lower court's dismissal on *forum non conveniens* ground.

5. Whether the Court of Appeals erred in giving no weight to the inability of the petitioner to implead third parties in the Court's review of a *forum non conveniens* dismissal.

6. Whether the Court of Appeals erred in giving special or substantial weight to the residence and citizenship of an American plaintiff in overruling the Trial Court's *forum non conveniens* dismissal.

7. Whether the Court of Appeals erred by denying the petitioners their right to due process guaranteed by the United States Constitution in overruling the Trial Court's *forum non conveniens* dismissal.

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The petitioners, Humphreys (Cayman), Ltd. and Holiday Inns, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 19, 1983.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, as well as the United States District Court for the Northern District of Iowa's order on Humphrey's (Cayman), Ltd.'s resisted motion to dismiss filed March 4, 1982

and the District Court's order on Victoria A. Lehman's resisted motion to reconsider, filed April 27, 1982.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on July 19, 1983. This petition for certiorari was filed within 90 days of that date plus permitted extensions. This Court's jurisdiction is invoked under 28 U.S.C. § *1254(1)*.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding the Trial Court abused its discretion in dismissing the action on the grounds of *forum non conveniens* when the lower court considered all relevant public and private interest factors found in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and its balancing of these factors are reasonable.

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6. Whether the Court of Appeals erred in giving special or substantial weight to the residence and citizenship of an

American plaintiff in overruling the Trial Court's *forum non conveniens* dismissal.

7. Whether the Court of Appeals erred by denying the petitioners their right to due process guaranteed by the United States Constitution in overruling the Trial Court's *forum non conveniens* dismissal.

STATEMENT OF THE CASE

This is a dispute between the executrix of the estate of Robert Wayne Lehman, on one side, and Holiday Inns, Inc. and Humphreys (Cayman), Ltd. which owns and operates a Holiday Inn franchise from Holiday Inns, Inc. in Cayman Islands, Grand Cayman, British West Indies.

In or around October of 1980, plaintiff's son, through a travel agency located in Clinton, Iowa, made reservations for a double occupancy at the Grand Caymanian Holiday Inn owned by Humphreys (Cayman), Ltd. He tendered payment, however, for only a single occupancy and it was not until the plaintiff's son arrived and registered that Humphreys (Cayman), Ltd. learned that the plaintiff's son would be accompanied by the decedent, Robert Wayne Lehman. At that time, the decedent was given accommodations at the Grand Caymanian. (A. p. 21a)

On November 21, 1980, while a guest at the Grand Caymanian, Lehman rented from Bob Soto's Diving, Ltd., a shop which leases a portion of the beach adjacent to the hotel, a Hobie Cat sailboat for sailing on the Carribean Sea. While sailing that day, Lehman was allegedly lost at sea. Plaintiff, in her complaint, contends that her decedent's death was caused by the defendants' negligence and breach of implied warranties.

Humphreys (Cayman), Ltd. moved for a dismissal on the grounds that there was insufficient process and that there were insufficient contacts between it and the state of Iowa to justify the Court's exercise of jurisdiction over it. Both Holiday Inns and Humphreys (Cayman), Ltd. further moved the Court to dismiss on the basis of *forum non conveniens*.

In an opinion entered on March 4, 1982, the Honorable Edward J. McManus overuled the defendant's motion to dismiss for insufficiency of process and lack of minimum contacts between Humphreys (Cayman), Ltd. and the state of Iowa but granted both Humphreys (Cayman), Ltd.'s and Holiday Inns, Inc.'s motions to dismiss on the grounds of *forum non conveniens.*

On March 12, 1982, the plaintiff filed her motion to amend findings and to alter or amend order and judgment which the District Court treated as a motion to reconsider, (A. p. 17a) which motion was denied by the Trial Judge on April 27, 1982.

In opposition to the plaintiff's motions, the defendants filed the affidavits of Paul Joseph Valentine Dougherty, attorney at law, licensed to practice law in Grand Cayman, indicating that the defendants are subject to the jurisdiction of the Cayman Court and are subject to service of process in that court, that the cause of action alleged by plaintiff in this action is cognizable under Cayman law, that Cayman law provides for the recovery of exemplary damages for more than simple negligence, that Cayman law provides that an estate may recover for wrongful death and that the decedent's dependents may recover their lost support, that Cayman law allows for an action for indemnity and contribution, that jury trials are available in civil matters and that a wrongful death action would not necessarily be limited to four or five thousand dollars as previously contended by the plaintiff. Humphreys (Cayman) further filed the affidavit of John S. Richbourg, reciting the identities of 17 witnesses including the individuals and employees of Bob Soto's Diving, Ltd. who leased the Hobie Cat to Lehman and who gave sailing instructions and tested Lehman's ability to operate the Hobie Cat, as well as individuals who saw the decedent alive while operating the Hobie Cat and search pilots and police officers who participated in the search and discovery of the lost sailboat. In addition, two of the witnesses offered by the defendants were employees of Humphreys (Cayman), Ltd., who could testify regarding the relationship between Holiday Inns, Inc. and Humphreys (Cayman), Ltd. These two employees of Humphreys (Cayman), Ltd. had no

knowledge about the facts surrounding the disappearance of Lehman. (R.35-39)

Plaintiff offered affidavits in support of her motions that indicated she would call two witnesses to testify concerning the weather conditions in Grand Cayman.

The Trial Court in considering defendant's motion to dismiss on the grounds of *forum non conveniens* acknowledged that there is a strong presumption in favor of the plaintiff's choice of forum, especially where the plaintiff has chosen the home forum, but realized that the resident plaintiff's forum choice is not dispositive. The Trial Court then considered the *Gilbert* private interest factors and public interest factors and concluded that virtually all key witnesses reside in Grand Cayman and that there would be no compulsary process for attendance of witnesses who live in Grand Cayman who are not citizens of this country and who are unwilling to voluntarily appear at trial. Most importantly, the Trial Court concluded that defendants will be unable to implead Bob Soto's Diving, Ltd. and felt that the more expeditious and inexpensive course would be for all claims and issues to be disposed of in one action.

The Trial Court further held that more significant local interest was in Grand Cayman and that Grand Cayman law would control in the action.

From the District Court's dismissal of the action the plaintiff took her appeal to the United States Court of Appeals for the Eighth Circuit. On July 19, 1983, the Eighth Circuit reversed the trial judge and remanded the case for trial. In doing so the Court of Appeals ruled that the Trial Court had abused its descretion in dismissing the complaint holding that the plaintiff's choice of the home forum should rarely be disturbed. The court found that the district court did not weigh properly the location of the parties witnesses and that the District Court gave undue weight to the defendants desire to implead a third party. The Court concluded that Iowa law may well control the plaintiff's claim for breach of warranties and that both Iowa and the United States have a significant interest in the litigation inasmuch as the defendants

are subject to the personal jurisdiction of Iowa under its procedures for extra-territorial service of process on non-residents. The Court of Appeals felt the District Court had not realistically considered Lehman's ability to litigate her claims in the foreign court. In particularly the Court ruled that the lack of the contingency fee system in Grand Cayman impaired her ability to litigate in Grand Cayman. Finally, the Court concluded that the District Court failed to give proper weight to the factor of Lehman's residence.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT.

The United States Supreme Court has dealt with *forum non conveniens* defenses in three cases that are worthy of note. They are *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumberman's Mutual Co.*, 330 U.S. 518 (1947); and most recently *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

The opinion below violates the *Gilbert* decision in applying the "minimum contracts" test promulgated by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

The Court of Appeals reasoned that the interest of the State of Iowa could be measured under the same standards used to measure the interest of a state in exercising jurisdiction over nonresident defendants. (A. p. 9a, 10a). This is error. The question before any Court in ruling upon the constitutionality of the extra-territorial service of process on nonresident defendants involves a defendant's minimum contacts with the forum state. If it does not offend traditional notions of fair play and substantial justice to exercise jurisdiction over a defendant, a court is justified in doing so. In dealing with *forum non conveniens* defenses, on the other hand, the ulltimate question before the Court is one of convenience. The two issues are separate and distinct and have been confused by the lower Court. In fact, in a *forum non conveniens* inquiry, jurisdiction of the court is

presumed. The only issue before the Court is whether to exercise or decline its jurisdiction. The doctrine of *forum non conveniens* does not come into play unless the court in which the action was brought has both subject matter and personal jurisdiction and venue is proper. See: *Federal Practice and Procedure*, Wright, Miller and Cooper, § 3828 at p. 179.

The *Gilbert* Court very laboriously set forth the various standards to be used as guides for a court to utilize in making *forum non conveniens* determinations. On page 506 of the decision, the Court held:

> "The *Neirbo* case is only a declaration that if the defendant, by filing the consent to be sued, waives its privilege to be sued at its place of residence, it may be sued in the federal courts at the place where it has consented to be sued. But the general venue statute plus the *Neirbo* interpretation do not add up to a declaration that the Court must respect the choice of the plaintiff, no matter what the type of suit or issues involved. The two taken together mean only that the defendant may consent to be sued, and it is proper for the federal court to take jurisdiction, not that the plaintiff's choice cannot be questioned. The defendant's consent to be sued extends only to give the court jurisdiction of the person; it assumes that the court, having the parties before it, will apply all the applicable law, including, in those cases where it is appropriate, its discretionary judgment as to whether the suit should be entertained. In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

From this holding by the Supreme Court it is clear that the fact a federal court may assume personal jurisdiction over a defendant (whether that defendant consents to the jurisdiction or whether a statute provides for jurisdiction) does not necessarily mean that it is convenient to litigate the matter in that particular forum. A court may be able to exercise personal jurisdiction over a defendant but may, using its sound discretion, decline to exercise such jurisdiction on the grounds of *forum non conveniens*. The

Gilbert Court realized that a trial judge may have personal jurisdiction but still refuse to entertain the litigation because it is inconvenient. The Court of Appeals has violated the holding in *Gilbert* by using "minimum contacts" criteria in determining Iowa's interest in the litigation.

After all, jurisdiction over a nonresident defendant is a constitutional inquiry into the limits of the due process clause while the *forum non conveniens* question is a discretionary decision by a Trial Court to refuse jurisdiction over the subject matter because of the inconvenience in litigating in that particular forum. The two issues are entirely different breeds of cat. It is entirely conceivable that a defendant may have the necessary minimum contacts to submit that defendant to the jurisdiction of a court and yet the forum itself may be obviously inconvenient for both the parties and the court.

The court below relied heavily upon the residence of the defendants in the United States and their solicitations of business in Iowa. But this residence and solicitation of business only indicate their willingness to be sued there, not the convenience of being sued there. The Court of Appeals ruling, therefore, violates the *Gilbert* decision in utilizing "long arm" rationale in making a *forum non conveniens* determination.

The Supreme Court on numerous occasions has held that a decision by a trial judge on the *forum non conveniens* issue is a discretionary one. *Gilbert, supra., Reyno, supra.* As this court phrased it in *Reyno:*

> "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interests factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its judgment for that of the District Court." p. 257.

Here, as in the *Reyno* case, the Court of Appeals realized that the standard of review was that of "abuse of discretion." While dispensing "lip service" to that standard of review, the Eighth Circuit has substituted its own judgment for that of the District Court. The Trial Judge, while giving excrutiating attention to detail, followed the standards set forth in the *Gilbert* and *Reyno* cases, giving proper weight to all relevant factors and exercised its discretion to refuse jurisdiction. In making its decision, the Trial Court considered all the *Gilbert* criteria. It recognized that there was a strong presumption in favor of the plaintiff's choice of forum, especially where the plaintiff has chosen his home forum. It also recognized that the plaintiff's choice of home forum was not dispositive because the relative conveniences could disfavor the plaintiff's choice of forum and justify dismissal. The Court then painstakingly examined each of the *Gilbert* private and public interests factors and concluded that the defendant's inability to compel attendance of witnesses and its inability to implead Bob Soto's Diving, Ltd. justified dismissal.

The Court further felt dismissal was justified from the public interest factors because of the more significant local interest in Grand Cayman and the fact that Cayman law would apply. In overruling the Trial Court, the Court of Appeals substituted its own discretion for that of the District Judge.

The Court of Appeals also differed with the lower court regarding the access to proof by cavalierly ignoring the defendant's affidavit setting forth the names and locations of seventeen witnesses all of whom are located in Grand Cayman other than two who live in Memphis and Miami and one with the U.S. Coast Guard (R.35-39). Although the record clearly refuted it, the Court of Appeals held that many of the witnesses worked for the Holiday Inn. Even though the plaintiff only asserted by her affidavit that she would call two U.S. witnesses the Court of Appeals found that the plaintiff had many witnesses within the United States.

Of course, the *Koster* case addressed itself to the use of affidavits in *forum non conveniens* defense. it held:

> "This Court cannot say that the District Court abused its discretion giving weight to the undenied sworn statements of fact in defendant's motion papers, especially in view of the failure of plaintiff's answering affidavit to advance any reason of convenience to the plaintiff. We hold only that a District Court, . . . may refuse to exercise its jurisdiction when a defendant shows much harrasment and plaintiff's response not only discloses so little counterveiling benefit to himself in the choice of forum as it does here, but indicates such disadvantage to support the inference of the forum he chose would not ordinarily be thought a suitable one to decide the controversy." p. 531, 532.

The Petitioners cannot help but agree with the Court in *Koster*. The Court of Appeals must take the record as it finds it and may not alter the record to justify its decision. The affidavit of the defendants in support of its motion to dismiss and the affidavit of the plaintiff supports the Trial Court's discretionary decision that compulsory process for the attendance of unwilling witnesses was not available to the plaintiff, despite the Court of Appeals finding to the contrary.

The Court of Appeals also disagreed with the Trial Judge's reasoning that Cayman law would apply in clear controversion of this Court's decision in both *Gilbert* and *Reyno*. It is known from the ruling in *Gilbert* that "there is an appropriateness . . . , in having the trial of a diversity case in a forum that is at home with the . . . law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws and in law foreign to itself." (p. 509) We also know from *Reyno* that "the public interest factors point towards dismissal where the Court would be required to 'untangle problems in conflict of laws, and in law foreign to itself.' " (citation deleted) (p. 251). However, the Court of Appeals in substituting its discretion for the Trial Judge criticized the lower court's ruling concerning the choice of law question and concluded that, although Cayman law may apply toward the negligence count, Iowa law may, in all probability, apply to the contract action, inasmuch as the warranties were made by the defendants in Iowa. (A. p. 12a). Even if the Court of Appeals is correct, the choice of law problem still points towards dismissal because a trial involving two sets of

laws will, unnecessarily, confuse a jury. *Reyno*, p. 260. In making its ruling regarding the choice of law, however, the Court of Appeals, again, paid no heed to the record in the case. From the order of the District Court it is revealed "through the affidavit of Cayman's executive vice-president, . . . that the reservation made in October by plaintiff's son was for a double room but that Cayman received advanced payment sufficient only for a single occupancy. Notwithstanding the failure to properly reserve a double occupancy room, Cayman allowed plaintiff's son to register for double occupancy when he arrived at the Grand Caymanian. It was not until he arrived and registered, however, that Cayman learned that plaintiff's son would be accompanied by Lehman and that Lehman would be a guest of the Grand Caymanian." (A. p. 21a)

Of course, warranties are creatures of contract law. There can be no breach of an express warranty unless the parties have entered into a contract based upon or containing those express warranties. The record is clear that while Lehman's son made a reservation in Iowa, Lehman, the decedent, had no contract for a room until he appeared at the registration desk in Grand Cayman. As a result, the contract was entered into in Grand Cayman and not Iowa. (A. p. 21a).

The Trial Judge also concluded on the same page of his decision:

> "It appears that the parties agree that Bob Soto's Driving[sic] Ltd. actually rented the Hobie Cat to Lehman. It also appears that Bob Soto's and Cayman are parties to some form of lease agreement in which Bob Soto's is lessee and Cayman, lessor. Bob Soto's is not a party to this action. It is a corporation organized under the laws of the Cayman Islands and it has no presence in or contacts with the United States." (A. p. 21a)

Of course, the plaintiff's contract theory of liability is based upon certain alleged warranties made by Humphreys (Cayman) concerning the availability of Hobie Cats for sailing in the Carribean Sea. However, the record clearly reflects that Lehman entered into a contract for the rental of the Hobie Cat with Bob

Soto's and that the rental of said Hobie Cat was entered into in Grand Cayman and not in Iowa. As a result, plaintiff suggests that the law of Grand Cayman would apply to both the negligence and the contract counts of the complaint because the contract in question was entered into and to be performed in Grand Cayman. Inasmuch as the Court of Appeals did not take these facts from the record into consideration, the opinion of the Trial Court is enhanced and, in all probability, the Trial Court is correct in ruling that the law of Grand Cayman applies to the action. This is a factor pointing toward the dismissal of the case on the ground of *forum non conveniens.*

In the Court of Appeal's opinion, great deference was afforded to the plaintiff's supposed inability to litigate in Cayman because of the unavailability of contingent fee arrangements in Grand Cayman. This position taken by the Court of Appeals violates the spirit, if not the letter, of this Court's ruling in *Reyno.* This Court concluded in *Reyno* that a possibility of less favorable law in the alternate forum should not ordinarily be given conclusive or even substantial weight in the *forum non conveniens* inquiry. Logic would dictate that if little weight should be given to the less favorable law in alternate forum, certainly less weight should be given to the less favorable terms and conditions in plaintiff's contract with her attorney in the alternate forum. How the lawyer's fees are paid has no place in a *forum non conveniens* inquiry. Neither *Gilbert* nor *Koster* made any mention of legal fees as a substantial factor in balancing the conveniences of a forum. Moreover, the only case cited by the Court of Appeals which mentions the contingent fee system, *Hodson, v. A.H. Robbins Co., Inc.,* 528 F. Supp. 809 (E.D. Va. 1981), while stating that the absence of a contingent fee system in England is a factor, concludes that this factor may be ignored unless plaintiffs demonstrate their inability to afford the litigation in a noncontingent fee system. In the *Hodson* case, the plaintiffs submitted affidavits attesting to their lack of sufficient funds to pursue their actions in England. But, on the contrary, in this action the Trial Court relied upon affidavits indicating that the plaintiff is far from a pauper and has sufficient funds on hand to retain counsel in Cayman.

According to *Reyno*, the Court must only ask itself: Is there an alternate forum which gives plaintiff an adequate remedy. Based upon the affidavits filed in the cause from an attorney licensed to practice in Grand Cayman. (A. p. 30a), that question must be answered affirmatively. Plaintiff's fee arrangement with his or her lawyer should never come into play in determining the availability of an alternate forum in a *forum non conveniens* inquiry.

These conflicts between the decision below and decisions of the United States Supreme Court justify the grant of certiorari to review the judgment.

2. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER APPLICATION OF *FORUM NON CONVENIENS* CRITERIA.

The decision of the Eighth Circuit in this case conflicts with various other circuits in its application of the *forum non conveniens* doctrine.

For instance, in *Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), various plaintiffs, one of whom was an American, sued a defendant manufacturer for deaths occuring in a helicopter crash. On page 784 of the decision the Court outlined steps a district judge must take:

> "Thus, district judges' *forum non conveniens* inquiry should proceed in four steps. As a prerequisite, the Court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case. Next, the trial judge must consider all relevant factors of *private* interest, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice. If the trial judge finds this balance of private interest to be in equipoise or near equipoise, he must then determine whether or not factors of *public* interest tip the balance in favor of a trial in a foreign forum. If he decides that the balance favors such a foreign forum, the trial judge must finally insure that the plaintiffs can reinstate their suit in the alternative forum

without undue inconvenience or prejudice." (emphasis theirs)

The petitioners argue that the trial judge below followed the four steps set forth in *Pain*. After considering all the relevant factors of private interest and after weighing the strong presumption against disturbing plaintiff's initial forum choice, it felt the question, albeit close, required dismissal. The trial court then turned to the public interest factors and found that those interests tipped the balance in favor of a trial in the foreign forum. It is not within the province of the Court of Appeals to overrule the discretionary decision of a district court when that district court has properly weighed all the relevant factors following the steps set forth in *Pain*. In doing so, the Court of Appeals has created a conflict between itself and the District of Columbia Circuit which rendered the *Pain* decision.

Another manner in which the Eighth Circuit has conflicted with other circuits involves the issue of the petitioner's ability or inability to implead a third party defendant. The Eighth Circuit gave no weight whatsoever to the defendant's inability to implead Bob Soto's Diving. The Eighth Circuit strained the facts to find that separate trials of plaintiff's claim against these defendants and indemnity action against Bob Soto's Diving would not require much duplication of proof or result in inconsistent judgments. The fact is that if the petitioners can show that the accident was caused not by negligence on their part but rather by the negligent acts and omissions of Bob Soto's Diving, they would be relieved of liability altogether. Both the *Pain* decision and *Fitzgerald vs. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052 (1976), consider the inability to implead other parties directly involved in the controversy a factor which weighs against the retention of jurisdiction. The Eighth Circuit gave no weight to the petitioner's inability to implead Bob Soto's Diving creating a conflict between itself and the Second and District of Columbia Circuits requiring this Court to grant certiorari.

Likewise, the *Pain* decision gave substantial consideration to the public interest factors set forth in Gilbert. It felt the greater

local public interest resided in Norway rather than the United States because the accident took place there and Norway has a substantial interest in applying its law to such cases in order to prevent accidents occuring within its borders and over its territorial water. In the same manner, Grand Cayman has a substantial interest in protecting its citizens and visitors from dangers associated with its surrounding waters. See also *Dahl v. United Technologies Corp.*, 632 F.2d 1027 (3d Cir. 1980).

The *Dahl* case and the *Pain* case also considered dismissal appropriate because of the applicability of local law. The Eighth Circuit considered the District Court's analysis of the choice of law questions to be defective and concluded that Iowa law may be applicable to the warranty claim. While the petitioners disagree with the Eighth Circuit, we find the Third Circuit's reasoning in *Dahl* persuasive:

> "We have reviewed the District Court's conflict of law analysis and we cannot say that the Court erred in concluding that the factor of applicable substantive law favored dismissal of the actions. We believe that Norweigan substantive law will predominate the trial of this case and that the mere presence of the count pleaded under Connecticut law but which may have little chance of success does not warrant a different conclusion. If we were to hold otherwise, the plaintiff could avoid dismissal on *forum non conveniens* grounds by the inclusion of the substantive count based on American law regardless of the merits of that claim." p. 1032.

The Third Circuit, therefore, will not preclude a *forum non conveniens* dismissal simply because the complaint contains a count to which American law would apply when foreign law predominates. On its holding below, the Eighth Circuit is in conflict.

Perhaps the most apparent conflict created by the Court of Appeal's opinion below concerns the weight that should be alloted to the citizenship and the residence of the palintiff. The Court below while stating that it does not place any "talismanic significance" on the fact that Lehman was a U.S. citizen, did give

more deference to the plaintiff's and her husband's U.S. citizenship and residence in Iowa. From a review of *Alcoa Steamship Co., Inc. vs. M/V Nordic Regent*, 656 F.2d 147 (2d Cir. 1981), and other cases, it is clear that the Second, District of Columbian, and Ninth Circuits disagree to a great extent. The *Alcoa* court in an *en banc* decision observed:

> "A trend of both the common law generally and admiralty law in particular has been away from according a talismanic significance to the citizenship or residence of the parties."

The Court concluded that the Supreme Court's decision in *Gilbert* contains all the criteria by which a *forum non conveniens* motion is determined. That is to say that there is a presumption in the law that the plaintiff's initial choice of forum is the correct one, but this presumption is a rebuttable one and may be overcome if the defendant can show that the forum is an inconvenient one. *Alcoa* holds, however, that ". . . the American citizenship of a plaintiff [does not] justify creating a special rule of *forum non conveniens.*" p. 159.

The District of Columbia Circuit subscribes to the *Alcoa* interpretation in *Pain vs. United Technologies Corp., supra.* On page 796 of the decision it states:

> "In the recent case of *Alcoa Steamship Co., Inc. vs. M/V Nordic Regent*, the Second Circuit sitting en banc rejected the notion that American citizens should be accorded preferential access to courts in the United States. The effect of the decision in *Alcoa* is to require an application of the *forum non conveniens* doctrine strictly pursuant to the tests set forth in *Gilbert* and *Koster* without regard to the citizenship of the parties. Although this approach differs somewhat from the approach previously followed by this Court in *Founding Church of Scientology vs. Verlag*, we find the Second Circuit's *en banc* reasoning in *Alcoa* persuasive."

The District of Columbia Circuit agreed with Judge Fineberg in *Schertenleib vs. Traum*, 589 F.2d 1156 (2d Cir. 1978) who

reasoned:

> "If litigation is in a clearly inconvenient forum, why should defendant and the Court be burdened with its continuing there, if an alternative forum now exists so that plaintiff will not be without a remedy?"

Petitioners agree and argue that the Eighth Circuit has placed too great a significance on the citizenship and residence of the plaintiffs. See also, *Mizokami Bros. vs. Baycham Corp,* 556 F.2d 975 (9th Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978) and *Vanity Fair Mills vs. T. Eaton Co.,* 234 F.2d 633 (2d Cir.) *cert. denied,* 352 U.S. 871 (1956).

Petitioners are aware that this Court dealt briefly with the subject of American citizenship and residence in the *Reyno* decision. However, the Court's holding there needs clarification. On page 255 of that decision, the Court stated:

> "The District Court acknowledged that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. It held, however, that the presumption applies with less force when the plaintiff or real parties in interest are foreign. . . . When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."

The question arises: Are there two presumptions or one presumption? That is to say, is there a presumption that any plaintiff's choice of forum is correct and an additional presumption on top of the first one stating that the plaintiff's choice of his *home* forum is even more correct? Petitioners think not and submit that any deference to a plaintiff who chooses his home forum is included in the original presumption in favor of any plaintiff's choice of forum. There should not be any greater deference given to a plaintiff who chooses his *home* forum than

any other plaintiff who exercises a choice of forum. The presumption is not fully applicable where a foreign plaintiff chooses a U.S. forum because that is not consistent with convenience. On the other hand, the presumption is fully applicable where the home forum is chosen because that is consistent with convenience. The presumption includes those class of plaintiffs who choose their home forum and a choice of a home forum permits no greater deference beyond the original presumption. The rule should be, then: A plaintiff's choice of forum is presumed convenient, particularly where the plaintiff chooses his home forum but not necessarily if an alien or non-resident chooses a U.S. forum. Once the presumption applies, the *Gilbert* standards should be reviewed to determine the convenience of the forum and none of these refer to the citizenship or residence of the plaintiff. The Eighth Circuit has applied the presumption and then given plaintiff's citizenship and residence even greater deference in conflict with *Alcoa* and *Pain*.

Petitioner's suggest that the Supreme Court needs to issue a writ of certiorari in this case to clarify its decision in *Reyno* and to do away with the conflicts between the Eighth Circuit on the one hand and the Second and District of Columbia Circuits on the other.

3. THE DECISION BELOW RAISES SIGNIFICANT RECURRING PROBLEMS CONCERNING PROCEDURES IN *FORUM NON CONVENIENS* INQUIRIES.

The Eighth Circuit's opinion in this case reflects important policy considerations growing out of *forum non conveniens* inquiries. American Courts have grown to be quite popular when compared to foreign forums. This is mainly due to products liability legislation not available in other jurisdictions, contingent fee systems, and prospects of a larger damage award from an American jury. As a result of this popularity of American forums, our judicial system has already become over-crowded with litigation that could have been brought in other forums. Time and time again, district judges will be called upon to rule on *forum non conveniens* objections. The criteria and guidelines to

be used in this important procedural question will arise over and over and will effect many litigants and courts in the future.

The Eighth Circuit's treatment of the *forum non conveniens* objection may have far reaching repercussions. It has held that standards generally reserved to determine the constitutionality of extra-territorial service of process may be used in measuring a forum state's interest in the litigation in ruling on *forum non conveniens* objections. If this holding is correct it means that many, many litigants who have minimum contacts with an American state and who may be subject to the personal jurisdiction of a U.S. court can be forced to litigate in that court when the forum is patently inconvenient. The impact of this decision will be felt worldwide.

The Eighth Circuit has also held, in effect that the nonexistence of a contingent fee system in an alternate forum is a criterion in determining the availability of an adequate alternate forum. The United States probably stands alone in permitting contingency fees. If the Court of Appeals is correct, American courts will be inundated with litigants eager to commence lawsuits with lawyers being paid contingently upon the outcome. In truth, a contingent fee may cost a plaintiff more or less than other type fee arrangements depending upon the outcome of the suit. It would be speculation on any court's part to conclude that the lack of a contingency fee makes litigation more expensive. Actually, palintiff may pay more under a contingent fee system than she would otherwise. How the lawyers ar paid has no place in a *forum non conveniens* inquiry.

Finally, it is of extreme importance that a trial court be able to control its own docket and to be able to use its sound discretion to refuse to exercise jurisdiction in inconveniently placed litigation. This Court needs to provide further instruction to lower courts to outline the extent of the trial judge's discretion and the limits of the Appellate Court's ability to interfere with that discretion.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-1645

VICTORIA A. LEHMAN, as Executor of the Estate of
ROBERT WAYNE LEHMAN, deceased,

Appellant,

v.

HUMPHREY CAYMAN, LTD. and
HOLIDAY INNS, INC.,

Appellees.

Appeal from the United States District Court for the Northern District of Iowa.

Submitted: February 14, 1983

Filed: July 19, 1983

Before LAY, Chief Judge, BRIGHT and ROSS, Circuit Judges.

LAY, Chief Judge.

Victoria Lehman appeals from the district court's dismissal of her wrongful death action against the defendants. The district court dismissed the action on the ground of forum non conveniens, holding that it would be more convenient for the suit to be brought in the Cayman Islands, British West Indies. We reverse and remand to the district court with directions to reinstate the suit.

Lehman's action stems from the presumed death of her husband, Robert Wayne Lehman, while he was a guest at the Grand Caymanian Holiday Inn in the Cayman Islands. Victoria Lehman is a citizen of the State of Iowa, as was Robert Lehman before his death. Humphrey Cayman, Ltd., is a corporation organized under the laws of the Cayman Islands, and maintains

corporate offices in Tennessee. Humphrey Cayman owns and operates the Grand Caymanian Holiday Inn, and is a franchisee of Holiday Inns. Holiday Inns is a Tennessee corporation, and maintains a registered agent in Iowa.

Robert Lehman and his son were guests of the Grand Caymanian Holiday Inn for several days in November 1980. On November 21, Robert Lehman rented a 16-foot "Hobie Cat" sailboat from a sailboat rental shop, Bob Soto's Diving Ltd., located on the hotel premises. Robert and two other persons set sail on the Caribbean Sea. Several hours later, observers informed the manager of the sailboat rental shop that Robert Lehman's sailboat was not visible from the shore. An air search was launched. Searchers eventually discovered only the wreckage of the sailboat; Lehman and his two companions are presumed dead.

Victoria Lehman brought suit in the federal district court for the Northern District of Iowa, alleging that the defendants breached express and implied warranties that the hotel and its facilities, including the rental shop and its sailboat, were safe for their intended uses, and that the defendants were negligent in failing to exercise the due care required of an innkeeper for the protection of its guest. The defendants moved to dismiss, arguing *inter alia* that the district court had no personal jurisdiction over the defendants, and that if personal jurisdiction did exist the action should be dismissed pursuant to the doctrine of forum non conveniens.

The district court held that it possessed personal jurisdiction over the defendants, but it agreed with the defendants that the Cayman Islands was the more convenient forum in which this suit should be litigated. The district court held that, after it considered the factors enunciated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947), it was "convinced that the interests of convenience require the dismissal of this action."

Analysis.

The determination of whether an action should be dismissed on the ground of forum non conveniens is committed to the sound discretion of the district court, and will be overturned only upon a showing of an abuse of that discretion. In *Gilbert*, the Supreme Court held:

> "Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses."

330 U.S. at 508 (footnote omitted).

Although perhaps no list of factors is exhaustive, the Supreme Court in *Gilbert* enunciated private and public concerns a trial court must consider when it decides whether to dismiss a case on the ground of forum non conveniens:

> "If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harrass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.
>
> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when

> litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

330 U.S. at 508-09 (footnotes omitted).

The district court, relying upon *Gilbert*, found that relevant private and public interest factors required dismissal of the action. Of the various private factors listed in *Gilbert*, the trial court discounted the relative ease of access to sources of proof and the possibility of a view of the premises. However, the court found dispositive (1) the fact that the defendants do not have available compulsory process for attendance of witnesses who live in the Cayman Islands, and (2) the fact that the defendants would not be able to implead Bob Soto's Diving Ltd., the sailboat rental shop, in a federal forum in Iowa. The trial court also found that the place of Lehman's death provided the Cayman Islands with the more significant "local interest" and that the substantive law of the Cayman Islands would control the case. Therefore, the court held that the interests of convenience required the dismissal of the action.

We may disturb the district court's decision only if we find an abuse of discretion; simply to disagree with the district court as if the facts had been presented to this court in the first instance cannot be the basis of our decision. *Paper Operations Consultants International, Ltd. v. SS Hong Kong Amber*, 513 F.2d 667, 670 (9th Cir. 1975).

Although the Supreme Court has ruled that the plaintiff's residence is not to be given dispositive weight in ruling on a

motion for dismissal under the doctrine of forum non conveniens, it is nonetheless a significant concern to be considered by the trial court. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981) (the presumption in favor of the plaintiff's choice of forum applies with less force when the plaintiff or real parties in interest are foreign).

In addition, earlier Supreme Court decisions have emphasized the deference to be given a plaintiff's choice of forum. In *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), the Court stated that "[i]n any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." *Id.* at 524. In *Gilbert*, relied upon by the district court, the Supreme Court admonished that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed," 330 U.S. at 508, and that jurisdiction is to be declined only in "exceptional circumstances," *id.* at 504.

Courts of Appeals have reinforced these considerations. In *Founding Church of Scientology v. Verlag*, 536 F.2d 429 (D.C. Cir. 1976), the court observed:

> "[C]ourts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country."

Id. at 435, *quoting Burt v. Isthmus Development Co.*, 218 F.2d 353, 357 (5th Cir. 1955).

See also Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981), in which the court held:

> "Thus, the plaintiff's choice of forum is more than just one factor that the trial judge must consider when balancing equities between two alternative forums. Trial judges do not have unchecked discretion to dismiss cases from a plaintiff's

> chosen forum simply because another forum, in the court's view, may be superior to that chosen by the plaintiff."

637 F.2d at 783 (footnote omitted).

See also Manu International, S.A. v. Avon Products, Inc., 641 F.2d 62, 65 (2d Cir. 1981) ("Emphasis on the district court's discretion, however, must not overshadow the central principle of the *Gilbert* doctrine that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' "); *Hoffman v. Goberman*, 420 F.2d 423, 426 (3d Cir. 1970).[1]

In our view the district court failed to properly weigh the parties' convenience in light of the above principles. The court made no finding of exceptional circumstances or that the defendants' interests "strongly" favored dismissal. In fact, the court indicated simply that it was a "close" question.[2]

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[1]Because the criteria for forum non conveniens dismissal in the state courts in Iowa are essentially the same as the federal criteria, *Silversmith v. Kenosha Auto Transport*, 301 N.W. 2d 725, 727-28 (Iowa 1981), we need not decide here whether state or federal law is the source of the rule. *See Gilbert*, 330 U.S. at 509; *Mizokami Brothers of Arizona, Inc. v. Mobay Chemical Corp.*, 660 F.2d 712, 719 n.10 (8th Cir. 1981); *Reyno v. Piper Aircraft Co.*, 630 F.2d 149, 157 and n.17 (3d Cir. 1980), *rev'd on other grounds*, 454 U.S. 235 (1981).

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[2]We recognize that, notwithstanding the plaintiff's choice of forum, if the balance of conveniences makes trial in the forum at issue *"unnecessarily burdensome"* for the defendant or the court, dismissal would be proper. *Piper Aircraft Co. v. Reyno*, 454 U.S. at 256 n.23.

We turn now to the district court's analysis.

A. *Location of Key Witnesses.*

The district court found that many of the key witnesses reside in the Cayman Islands, and that the defendants have available to them no compulsory process to compel the attendance of unwilling witnesses at a trial in this country. The district court also found that to the extent such witnesses would be willing to appear, the cost to the defendants of transporting them to trial in Iowa would be substantial.

In making this evaluation, the district court did not address the fact that many of the witnesses work for the Holiday Inn and compulsory process probably would not be necessary to produce its own employees for an appearance at trial. Furthermore, the geographical location of the witnesses should not be dispositive. The time and expense of obtaining the presence or the testimony of a foreign witness in a local forum are significantly lessened by modes of communication and travel that are commonplace today. Use of admissions can also eliminate the need for much of the testimony. Furthermore, the district court did not consider the possibility of taking the foreign witnesses' testimony in the Cayman Islands, or wherever else they may be located. *See* Fed. R. Civ. P. 28(b) and 29. *See also Calvano Growers of California v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980) (Newman, J., concurring), *cert. denied*, 449 U.S. 1084 (1981). Moreover, Lehman's claim for relief is based upon two counts: (1) breach of express and implied warranties and (2) negligence. Although the accident took place in the Cayman Islands, most of the contractual arrangements for the accommodations with the travel agency and with Holiday Inn took place in Iowa, and therefore many witnesses with knowledge relevant to the warranty count would be present in Iowa. In addition, Robert Lehman was a long-time resident of Iowa; as such, witnesses material to the plaintiff's claim also would be closer to the local forum than to the Cayman Islands. At best we find that, in light of the location of the defendants' witnesses, Lehman's choice of an Iowa forum is not suggestive of harrassment of the defendants nor oppressive to their defense. This factor standing alone does not set forth exceptional circumstances of inconvenience for the

defendants to defend in an Iowa court. The location of the defendants' witnesses, when balanced with the plaintiff's inconvenience to produce witnesses in the Cayman Islands, is not an exceptional circumstance which would justify the denial of the plaintiff's choice of a local forum.

B. *The Defendants' Ability to Implead.*

The district court placed great emphasis upon the defendants' inability to implead the sailboat rental shop if the action were tried in Iowa. We think the court erred in doing so. The defendants' primary defense appears to be that it was not negligent in its actions toward Robert Lehman, and that if any party was negligent, it was the sailboat rental shop, Bob Soto's Diving Ltd. (Soto). The defendants contend that if trial is held in federal court in Iowa, they will be unable to implead Soto as a third-party defendant in a claim for contribution or indemnity since the court has no personal jurisdiction over Soto. The district court concluded that the more expeditious and inexpensive course of action would be for all claims to be resolved in a single action in the Cayman Islands. *See Piper Aircraft Co. v. Reyno*, 454 U.S. at 259.

It is certainly more efficient, from the viewpoint of the administration of justice, to have all disputes arising from an incident settled in one place and in one lawsuit. The liberal joinder of parties allowed by the Federal Rules of Civil Procedure is designed to achieve such efficiency. However, as the Second Circuit has held, "impleader practice is discretionary with the courts and care must be taken to avoid prejudice to the plaintiff or third-party defendant." *Olympic Corp. v. Societe Generale*, 462 F.2d 376, 379 (2d Cir. 1972). In the present case, as in *Olympic Corp.*, the difference between the plaintiff's claims against the defendants and the latter's claims against the third-party defendant is such that it is not likely that separate trials of the claims would require much duplication of proof or result in inconsistent judgments. In addition to the negligence count, Lehman is suing the defendants for the alleged breach of

warranties contained in the defendants' advertising materials received by Robert Lehman in the United States. Whatever claim the defendants might have against Soto for indemnity or contribution based on the defendants' alleged breach of these warranties certainly would not involve the same issues as Lehman's warranty claim against the defendants, since the warranties were made by the defendants, not by Soto. *See Olympic Corp.*, 462 F.2d at 379. Therefore, although trial of all claims in the Cayman Islands may be more expeditious from a viewpoint of judicial administration, this is so only to a slight degree, and does not take into account the convenience of all parties. Assuming judgment were rendered against the defendants, they would be free to pursue their claim for contribution or indemnity against Soto in an action in the Cayman Islands.

C. *Interest of the Forum in the Dispute.*

The district court held that the Cayman Islands have a more significant local interest in the dispute than do Iowa and the United States. Robert Lehman was a guest of the Grand Caymanian Holiday Inn at the time of his death. He rented a sailboat from a Caymanian shop, and the accident took place in the Cayman Islands.

However, we find the district court failed to weigh the fact that Iowa and the United States have an equally strong local interest in the dispute. Robert Lehman was a resident of Iowa, the defendants engaged in a systematic advertising effort to generate business in Iowa, the representations regarding the hotel and its facilities were directed at Robert Lehman and his son in Iowa, and the hotel reservations were made through a travel agency in Iowa. We find that when the defendants have conducted business in Iowa to this extent,[3] and when an Iowa resident is killed or

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[3]The district court, in holding that it possessed the power to exercise personal jurisdiction of the defendants, found that "it is quite likely that Lehman and his son would never have chosen the Grand Caymanian if Cayman had not engaged in a systematic effort to generate business in Iowa." This may be contrasted with cases in which the litigation had

injured during the course of his business with the defendants, the State of Iowa and the United States have an interest in seeing that the plaintiff is provided a convenient local forum, especially when the only alternative forum available to the plaintiff is outside the United States. In determining whether the defendants would be subject to personal jurisdiction in an Iowa forum, the district court noted that "the forum state's interest in providing a forum for its injured residents is neither insignificant or absent. . . . In addition to the interest of Iowa, in a case such as this where the only available United States venue lies in a single district, the United States itself has an interest in seeing that plaintiff is provided a forum in this country." But this reasoning was either ignored or given little weight when the trial court evaluated the

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little or no connection with the forum, and the action was dismissed on the ground of forum non conveniens. For example, in *Gilbert*, a Virginia plaintiff sued a defendant incorporated in Pennsylvania. Suit was brought in federal district court in New York. The suit stemmed from a fire, allegedly caused by the defendant, at the plaintiff's warehouse in Virginia. The suit was dismissed in favor of a Virginia forum. 330 U.S. at 502-03.

In *Paper Operations Consultants International, Ltd. v. SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975), the plaintiff cargo owner, a Bahamian corporation with its principal office in Florida, sued the defendant ship owner, a Liberian corporation. Suit was brought in federal district court in San Francisco. The suit arose from the defendant's shipment of the plaintiff's cargo from Vancouver, British Columbia to Singapore. The only connection San Francisco had with the dispute was that the plaintiff's San Francisco counsel began pre-litigation negotiations in San Francisco with the agency that issued the bill of lading. The action was dismissed in favor of a Vancouver forum. *Id.* at 669, 672.

Finally, in *J.F. Pritchard & Co. v. Dow Chemical of Canada, Ltd.*, 462 F.2d 998 (8th Cir. 1972), the plaintiff sued regarding a construction contract between the plaintiff's Canadian subsidiary and the Canadian defendant. Suit was brought in federal district court in Missouri. The contract was executed by Canadian companies, was almost entirely

convenience of the parties and the interest of the Iowa forum in entertaining the case.[4]

D. *Application of Substantive Law.*

The district court held that according to Iowa's choice of law rule[5] the substantive law of the Cayman Islands would govern

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performable in Canada, and the majority of work under the contract was done in Canada. The contract called for the application of Canadian law, and any judgment for the plaintiff would have to be enforced in Canada. In addition, suit on the contract was already pending in a Canadian court. *Id.* at 1000. In upholding the district court's dismissal, this court said: "Appellant made his bed in Canada; now he must lie in it if he wishes to proceed." *Id.* at 1002.

[4]*See Aigner v. Bell Helicopters, Inc.*, 86 F.R.D. 532, 543 (N.D. Ill. 1980) ("When . . . it is shown that there exists a significant relationship between the forum at issue and the litigation, the plaintiff's choice of forum must be accorded great weight and, for that reason, 'should rarely be disturbed.' ").

We note that the question whether a forum may exercise personal jurisdiction over a defendant involves "traditional notions of fair play and substantial justice," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), *quoting International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), while a determination of a forum non conveniens issue involves the relative *convenience* of the parties to suit in one forum vis-a-vis other forums. In spite of this distinction it would seem inconsistent for a court to hold that Iowa and the United States have an interest in a dispute for purposes of determining personal jurisdiction, but not for purposes of determining the convenience of the forum. Therefore, as we analyze the forum non conveniens issue in this case, we rely to some extent on the district court's findings regarding its personal jurisdiction over the defendants.

[5]*See Zeman v. Canton State Bank*, 211 N.W.2d 346, 348-49 (Iowa 1973) ("most significant relationship"); *see also Restatement (Second) of Conflict of Laws* §§ 6, 145 (1971).

this dispute. This finding, if correct,[6] would weigh in favor of trial in the Cayman Islands. *See Gilbert*, 330 U.S. at 509 ("appropriateness . . . in having the trial of a . . . case in a forum that is at home with the . . . law that must govern the case"). However, we find the district court's analysis failed to take into consideration the fact that Lehman's warranty claims have their roots in Iowa and may necessarily involve Iowa law. It is true that the negligence claim is based upon the events in the Cayman Islands and Cayman Island law likely would govern that count. However, the fact that a federal court may be required to apply foreign law is not dispositive on the forum non conveniens issue. Federal courts are quite capable of applying foreign law when required to do so, and a district court's application of foreign law is a factual matter reviewable on appeal. *Manu International, S.A. v. Avon*

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[6]We are not certain that the substantive law of the Cayman Islands would govern this dispute entirely. In conflict-of-laws questions, Iowa has adopted the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws. *Conradi v. Boone*, 316 F. Supp. 918, 920 (S.D. Iowa 1970); *Cole v. State Automobile & Casualty Underwriters*, 296 N.W.2d 779, 781 (Iowa 1980); *Zeman v. Canton State Banki*, 211 N.W.2d at 348-49. Under this approach (we note without deciding the issue) it is probable that the substantive law of the Cayman Islands would govern the negligence count. *See Restatement (Second) of Conflict of Laws* §§ 145, 146 (1971). However, it is not clear that the law of the Cayman Islands would govern Lehman's breach of express warranty action. *Cf. id.*, § 188 (contacts to consider in determining most significant relationship include the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties). We note, again without deciding the question, that it is arguable that the substantive law of Iowa should govern Lehman's express warranty claim. The express warranty was made by the defendants in Iowa, and it was received and accepted in Iowa when reservations were made in Iowa for accommodations in the defendants' hotel. *See generally Cole v. State Automobile & Casualty Underwriters*, 296 N.W.2d at 781; *Joseph L. Wilmotte & Co. v. Rosenman Brothers*, 258 N.W.2d 317, 325-26 (Iowa 1977).

Products, Inc., 641 F.2d at 67-68 ("[W]e must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore federal courts must often perform"); *Olympic Corp. v. Societe Generale*, 462 F.2d at 379; *Hoffman v. Goberman*, 420 F.2d at 427; *Burt v. Isthmus Development Co.*, 218 F.2d at 357.

E. *Plaintiff's Ability to Litigate in a Foreign Forum.*

We find the district court failed to consider fully the practical results of its decision to dispatch Lehman to the Cayman Islands to litigate her dispute. Attorneys in the Cayman Islands apparently do not accept cases on a contingent fee basis, and Lehman states that she is financially unable to pay the retainer fee that a Cayman Island attorney would require. Lehman also argues that it would be unlikely that she would be able to obtain a jury trial in the Cayman Islands, and furthermore, since she is a foreigner, a court there would require her to post a cost bond of at least $1,000. Lehman also argues that recoveries in the Cayman Islands for wrongful death generally do not exceed $5,000; the defendants dispute the latter statement.

As the district court noted, a plaintiff's showing of less favorable substantive law in the alternative forum is not to be given conclusive or even substantial weight in a forum non conveniens determination. *Piper Aircraft Co. v. Reyno*, 454 U.S. at 247. However, this is not an issue concerned wholly with a less favorable substantive law. The court must be alert to the realities of the plaintiff's position, financial and otherwise, and his or her ability as a practical matter to bring suit in the alternative forum. *See Manu International, S.A. v. Avon Products, Inc.*, 641 F.2d at 67; *Thomson v. Palmieri*, 355 F.2d 64, 66 (2d Cir. 1966); *Hodson v. A. H. Robins Co.*, 528 F. Supp. 809, 818 (E.D. Va. 1981).

F. *Residence of the Parties.*

The defendants argue that *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir. 1980), represents the modern trend that the American citizenship of the plaintiff should not bar a forum non conveniens dismissal when the only alternative forum is in a foreign jurisdiction. *See id.* at 154-56. We

do not place any "talismanic significance" on the fact that Lehman is a United States citizen. However, significant contacts between the defendants and Robert Lehman took place in the United States, and as we noted, Iowa and the United States have a significant interest in this dispute. These facts arise largely as a result of Lehman's (and her husband's) residence in Iowa.[7]

In a case decided after the *Alcoa Steamship* decision, the Second Circuit observed:

> "It is almost a perversion of the *forum non conveniens* doctrine to remit a plaintiff, in the name of expediency, to a forum in which, realistically, it will be unable to bring suit when the defendant would not be genuinely prejudiced by having to defend at home in the plaintiff's chosen forum."

Manu International, S.A. v. Avon Products, Inc., 641 F.2d at 67.

In *Founding Church of Scientology v. Verlag*, 536 F.2d 429 (D.C. Cir. 1976), the court of appeals, in reversing the district court's forum non conveniens dismissal, found significant the fact that the defendant was a resident of the United States. "In incorporating in this country and locating here," the court said, "they have in effect signified their willingness to be sued in American courts." *Id.* at 435. In this case, the defendant Holiday Inn is a Tennessee corporation. Although the defendant Humphrey Cayman is a Caymanian corporation, it maintains corporate offices in Tennessee. Thus, in this case, as in *Verlag*, the fact that the defendants are located in this country is one indication that it would be less burdensome for the defendants to defend suit in this country than it would be for Lehman to litigate in a foreign country.

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[7] In *Piper Aircraft Co. v. Reyno*, 454 U.S. at 255-56, it was held that a foreign plaintiff's choice of forum is given less weight than the choice of a resident or citizen, because it is much less reasonable to assume that a foreign plaintiff's choice of a United States forum is based on convenience than it is to assume that a United States plaintiff's choice of a United States forum is based on convenience. *See also* Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U.Chi.L.Rev. 373, 382-83 (1980).

The court in *Verlag* noted: "The doctrine that a United States citizen does not have an absolute right to use United States courts usually is expressed in the context of a citizen doing business abroad, expecting still to use United States courts." 536 F.2d at 435 (quoting *Thomson v. Palmieri*, 355 F.2d at 65). Such was the case in *Alcoa Steamship Co. v. M/V Nordic Regent*, in which the plaintiff was a New York corporation, and owned a pier in Trinidad. The suit arose when the Nordic Regent collided with the pier. In holding that Trinidad's limitation of damages law did not militate against the district court's decision that Trinidad was the more convenient forum, the Second Circuit said:

> "[I]t is not at all unfair for appellant to recover the lesser amount. Its pier was in Trinidad. It was not likely to go traveling. As long as it did not, Trinidad's damage limitation law governed. it would be far more unfair to impose an additional recovery against appellee when appellant, fully familiar with the law of the place where it maintained a permanent business, could have insured its additional risk in a prudent fashion. There is no reason to suppose that it has not done so."

654 F.2d at 159.

In this case, Robert Lehman was not doing business aboard on a daily basis, but instead was pursuing a personal vacation of a few days' duration in a vacation spot located just outside the United States. In arranging his vacation he dealt with an American corporation and relied on the defendants' representations received by him in Iowa. The defendants, on the other hand, actively solicited business in the United States, were incorporated or at least maintained corporate officers here, and fairly could be expected to anticipate and take into account the cost of defending a lawsuit brought in a United States forum. Thus, even though considerations of fairness are more properly part of the jurisdictional analysis than of a forum non conveniens determination, the above-discussed factors indicate the relative conveniences of the parties and their respective abilities to bring or defend against a lawsuit brought in the United States or the Cayman Islands.

Conclusion.

We find that the district court did not weigh properly the location of the parties' witnesses relating both to liability and damages. We find as well that the district court gave undue weight to the defendants' desire to implead a third-party defendant. In addition, the court failed to consider that Iowa law may well control Lehman's claim for breach of warranties, and that both Iowa and the United States have a significant interest in the litigation. The district court also failed to consider realistically Lehman's practical ability to litigate her claims properly in a foreign court, and failed to give proper weight to the significant factor of Lehman's residence, and the significant local contracts that arose as a result of that residence.

In light of the Supreme Court's direction that a dismissal on the ground of forum non conveniens should occur only *rarely* and in extraordinary circumstances,[8] and only when the balance of conveniences weighs strongly in favor of dismissal, we hold that the district court abused its discretion in dismissing Lehman's action. Accordingly, the district court's decision is reversed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[8] *Piper Aircraft Co. v. Reyno*, 454 U.S. at 255; *Gilbert*, 330 U.S. at 504, 508, 509; *Koster v. (American) Lumbermens Mutual Casualty Co.*, 330 U.S. at 524.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. C 81-131

VICTORIA A. LEHMAN, as Executor of the Estate of ROBERT WAYNE LEHMAN, Deceased,

Plaintiff,

vs.

HUMPHREY CAYMAN, LTD. and HOLIDAY INNS, INC.,

Defendants

ORDER

This matter is before the court on plaintiff's resisted motion to reconsider,[1] filed March 12, 1982. Denied.

On March 4, 1982, this court ordered the dismissal of this action for forum non conveniens. Judgment was entered accordingly on that same day. Plaintiff now seeks to have the court reconsider that decision. Plaintiff makes essentially three

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[1]Plaintiff's motion is characterized as one "To Amend Findings And To Alter Or Amend Order And Judgment; and it is brought pursuant to FRCP 52(b) and 59(e). Defendants argue that rule 52(b) is not meant to be used as a vehicle for rehearing a matter on the merits. While the court is inclined to agree with that proposition, *see Evans, Inc. v. Tiffany & Co.*, 416 F.Supp. 224 (N.D. Ill. 1976). it is unnecessary to do so because specific authority to reconsider the court's earlier ruling exists under FRCP 59(e) and 60(b). *See generally* 11 C. Wright & A. Miller, *Federal Practice & Procedure* §§ 2817 and 2857 (1973).

arguments in support of her motion. First, she says that she will be unduly prejudiced if forced to litigate her claim in the courts of the Cayman Islands. Specifically, she asserts that a jury trial is unavailable under the law of the Cayman Islands, that attorneys in that jurisdiction do not work for a contingent fee and would require a retainer of approximately $5,000.00, that the courts there would require her, as a foreigner, to post a cost bond of at least $1,200.00, and that wrongful death recoveries there generally do not exceed $4,000.00 to $5,000.00. Second, plaintiff maintains that special weight should be accorded the fact that she is a resident and citizen of Iowa. Third, she asserts that the court's decision is without precedent.

The court is unpersuaded that its decision was incorrect. Even assuming that plaintiff will not be able to have her claim decided by a jury and that her recovery will not exceed $5,000.00, assumptions that are questionable,[2] the court is disinclined to change its mind. *Piper Aircraft Co. v. Reyno*, 102 S.Ct. 252 (1981) (mere showing of less favorable substantive law in foreign forum not dispositive); *Abouchalache v. Hilton International Co.*, 464 F.Supp. 94, 98 (S.D.N.Y. 1978), *aff'd mem.*, 628 F.2d 1344 (2nd Cir. 1980) ("A district court has discretion to dismiss an action under the doctrine of foreign non conveniens . . . even though the law applicable in the alternative forum may be less favorable to plaintiff's chance and amount of recovery.") With regard to the financial consequences of being forced to litigate in the Cayman Islands, the court is not convinced that plaintiff cannot afford the expense of doing so. By her own filing, it

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[2]In an affidavit attached to defendants' resistance, Paul Joseph Valentine Dougherty, an attorney licensed to practice in the Cayman Islands, attests that a jury trial is available upon request and a showing that "the matter is one that can be properly" tried by a jury. He also attests that the recovery for wrongful death, if any, would turn on the facts of plaintiff's case and that it would not necessarily be limited to $4,000.00 to $5,000.00. In this regard, the court also notes that exemplary damages are available under the law of the Cayman Islands, according to Mr. Dougherty's earlier affidavit.

appears that she has available to her from her husband's estate approximately $14, 750.00. As for her argument that the fact of her United States citizenship and residence deserves "special weight," such a proposition is not supported in the law. The court gave the consideration to this factor required by the Supreme Court in *Reyno* and was convinced that the balance of conveniences favored dismissal. The court is still so convinced. Lastly, plaintiff's assertion that the court's decision was without precedent is unfounded. *E.g. Alcoa Steamship Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147 (2nd Cir. 1981); *Mizakami Brothers of Arizona, Inc. v. Baychem Corp.*, 556 F.2d 795 (9th Cir. 1977); *Abouchalache v. Hilton International Co.*, 464 F.Supp. 94 (S.D.N.Y. 1978).

It is therefore
ORDERED
DENIED.
April 27, 1982.

/s/ Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

No. C 81-131

VICTORIA A. LEHMAN, as Executor of the Estate of ROBERT WAYNE LEHMAN, Deceased,

Plaintiff,

vs.

HUMPHREY CAYMAN, LTD. and HOLIDAY INNS, INC.,

Defendants

This matter is before the court on defendant Humphrey Cayman, Ltd.'s (Cayman's), resisted motion to dismiss,[1] filed December 18, 1981. Granted

In this diversity action, plaintiff, as executor of the estate of Robert Lehman (Lehman), seeks damages for Lehman's death. Plaintiff is an Iowa citizen. Defendant Holiday Inns, Inc. (Holiday Inn), is a Tennessee corporation. Defendant Cayman is a corporation formed pursuant to the laws of the Cayman Islands, a British Crown Colony located in the West Indies, and it maintains corporate offices in Tennessee. Jurisdiction of the subject matter of this action exists under 28 USC § 1332(a).[2]

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[1]Defendant Holiday Inns, Inc., joins in Cayman's motion to the extent it is based on the doctrine of forum non conveniens.

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[2]Plaintiff's complaint does not adequately allege jurisdictional facts—it contains no allegation of the principal places of business of Cayman or Holiday Inn—but this defect is curable by amendment. 28 USC § 1653. Because of the court's disposition of defendants' motion, however, such amendment is unnecessary.

As indicated, this action arises out of the death of Lehman. The facts, as gleaned from the complaint, Cayman's motion and supporting affidavits, and plaintiff's resistance to Cayman's motion and her supporting affidavit, are as follows. Sometime in October or November of 1980, plaintiff's son, through a travel agency located in Clinton, Iowa, made and paid for reservations for himself and Lehman for a double room at the Grand Caymanian Holiday Inn (Grand Caymanian),[3] located on Grand Cayman Island, British West Indies, and owned and operated by Cayman.[4] The reservations covered the period of November 14 to November 22, 1980. On November 21, 1980, while a guest of the Grand Caymanian, Lehman rented from a shop located on the premises of the Grand Caymanian a Hobie Cat sailboat for sailing on the Caribbean Sea.[5] While sailing on the Caribbean Sea that day, Lehman was lost at sea. He is now presumed dead. Plaintiff alleges that Lehman's death was proximately caused by

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[3]Through the affidavit of Cayman's Executive Vice-President, Cayman asserts that the reservation made in October by palintiff's son was for a double room, but that Cayman received advance payment sufficient only for single occupancy. Notwithstanding the failure to properly reserve a double occupancy room, Cayman allowed plaintiff's son to register for double occupancy when he arrived at the Grand Caymanian. It was not until he arrived and registered, however, that Cayman learned that plaintiff's son would be accompanied by Lehman and that Lehman would be a guest at the Grand Caymanian.

[4]According to the affidavit of Cayman's Executive Vice-President, Cayman operates the Grand Caymanian under a franchise agreement with Holiday Inn. Plaintiff alleges that this agreement gave Holiday Inn a right of control over Cayman in the operation of the Grand Caymanian and that Holiday Inn exercised that right at all times relevant to this action.

[5]It appears that the parties agree that Bob Soto's Driving Ltd. actually rented the Hobie Cat to Lehman. It also appears that Bob Soto's and Cayman are parties to some form of lease agreement in which Bob Soto's is lessee and Cayman lessor. Bob Soto's is not a party to this action; it is a corporation organized under the laws of the Cayman Islands and it has no presence in or contacts with the United States.

defendants' negligence and breach of express and implied warranties.

Cayman now moves for dismissal, basing its motion on three separate grounds. First, it challenges the sufficiency of process. Second, it maintains that there exists insufficient contacts between it and the State of Iowa to support this court's exercise of in personam jurisdiction. Last, it seeks dismissal on the basis of forum non conveniens.[6] These matters will be taken in turn.

In a diversity case such as this, the determination of the sufficiency of process requires an analysis of the Federal Rules of Civil Procedure and of pertinent state court rules and state statutes. *See generally* 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1062 (1969). In this case, plaintiff, following the teaching of FRCP 4(e), made several attempts to effect service of process pursuant to Iowa statute or rule of court. Initially, plaintiff attempted to utilize one of Iowa's long-arm statutes, Iowa Stat. § 617.3. Apparently in response to Cayman's motion challenging her compliance with that statute, plaintiff attempted to re-serve Cayman by personally serving its Vice-President. Cayman, in its first amended motion to dismiss, challenged this second service asserting that it was not provided with a summons as required by FRCP 4(d). Plaintiff's third attempt at service followed. Cayman, in its second amended motion to dismiss, now challenges that third service of process.

Cayman asserts that plaintiff's third attempted service of process is without effect because plaintiff failed to obtain a court order under Iowa Rules of Civil Procedure 56.1(n) and 56.2. Rules 56.1 and 56.2 have been construed by this court and by the United States District Court for the Southern District of Iowa as providing an alternate method of service to that set out in Iowa's long-arm statutes. *Roadway Express, Inc. v. Piekenbrock*, No. C 80-1007 (N.D. Ia. Aug. 15, 1980); *Mahaska Bottling Co. v. Southdown Sugars, Inc.*, 79 FRD 704 (S.D. Ia. 1978). Rule 56.2 provides in part:

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[6]See n.1, *supra*.

ALTERNATE METHOD OF SERVICE

"Every corporation . . . that shall have the necessary minimum contact with the state of Iowa shall be subject to the jurisdiction of the courts of this state, and the courts of this state shall hold such corporation . . . amenable to suit in Iowa in every case not contrary to the provisions of the constitution of the United States.

Service may be made on any such corporation . . . (a) as provided in rule 56.1 within or without the state, or (b) if such service cannot be so made, in any manner consistent with due process of law prescribed by order of the court in which the action is brought."

Rule 56.1(f) and (n) provide, respectively:

PERSONAL SERVICE

"Original notices are "served" by delivering a copy to the proper person. Personal service may be made as follows:

. . . .

(f) Upon . . . a . . . . foreign corporation, by serving any present or acting or last known officer thereof, or any general or managing agent, or any agent or person now authorized by appointment or by law to receive service of original notice . . .

. . . .

(n) If service cannot be made by any of the methods provided by this rule, any defendant may be served as provided by court order, consistent with due process of law."

Cayman suggests that plaintiff could only effect service on it under Rules 56.1 and 56.2 by first obtaining a court order prescribing the method of service. The court's reading of the above quoted portions of those rules convinces it otherwise, however. Here, plaintiff utilized IRCP 56.1(f) to serve Cayman. Therefore, rules 56.1(n) and 56.2(b) do not come into play. Accordingly, it may not be said that plaintiff's third service of process was defective.

Cayman also seeks dismissal on the ground that there exists insufficient contacts between it and Iowa to support this court's

exercise of in personam jurisdiction. Initially, it must be noted that the court, in ruling on this portion of Cayman's motion, must assume that the facts contained in plaintiff's complaint supporting jurisdiction are true. *Hutson v. Fehr Bros., Inc.*, 584 F2d 833, 835 (ith Cir.), *cert. denied sub nom., Fehr Bros., Inc. v. Aeciaierie Weissenfels*, 439 U.S. 983 (1978). Furthermore, any conflicts in the affidavits that were submitted on this issue must also be resolved in plaintiff's favor. *Wessel Co. v. Yaffee & Beitman Management Corp.*, 457 F.Supp.1 939 (N.D. Ill. 1978); *see Atlantic Lines, Ltd. v. M/V Domburgh*, 473 F.Supp. 700 (S.D. Fla. 1979).

It is well understood that the due process clause of the fourteenth amendment requires that a person must have some minimum contact with a given forum before that forum can hale him into its courts. In *International Shoe v. Washington*, 326 U.S. 310 (1945), the leading modern case in this area, it was held that defendant's contacts with the forum state must be such that the maintenance of litigation does not offend "traditional notions of fair play and substantial justice." In the later case of *Hansen v. Denkla*, 357 U.S. 235 (1958), it was stated that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its law." 357 U.S. at 253. Stated differently, the exercise of personal jurisdiction over a non-resident defendant may occur only when the defendant, through his contact with the forum, "should reasonably anticipate being haled into court there. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

It is axiomatic that each case in which jurisdiction is challenged turns on its own facts. *E.G. Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952). To aid the district courts, the Eighth Circuit has set out a five-factor test for analyzing the question whether the exercise of personal jurisdiction meets constitutional muster. *Caesar's World, Inc. v. Spencer Foods, Inc.*, 498 F.2d 1176 (8th Cir. 1974). The five factors, the first three of which are of primary importance, are (a) the quantity of defendant's contacts with the forum state; (2) the nature and

quality of those contacts; (3) the source and connection of the cause of action with those contacts; (4) the interest of the forum state; and (5) convenience. 498 F.2d at 1180.

The application of the *Caesar's World* test convinces the court that it may constitutionally exercise jurisdiction over Cayman. According to plaintiff, Cayman and, on Cayman's behalf, Holiday Inn are engaged in a systematic and pervasive advertising program in Iowa. This advertising is accomplished via Holiday Inn directories, which are provided to all Holiday Inn hotels in Iowa, and brochures and other materials provided to Iowa travel agencies. Pursuant to an arrangement with Holiday Inn, reservations for the Grand Caymanian can be made by mail or telephone through any Holiday Inn hotel in the United States. Also, reservations may be made through Iowa travel agencies. Indeed, in this case the reservations utilized by Lehman was made through an Iowa travel agency and that agency received a commission on the basis of that reservation. The court, on the basis of these assertions none of which is refuted by Cayman, is of the view that the quantity and quality of Cayman's contacts with Iowa weigh in favor of the exercise of jurisdiction. Furthermore, the court considers Cayman's contacts with Iowa to be closely connected with this cause of action; it is quite likely that Lehman and his son would never have chosen the Grand Caymanian if Cayman had not engaged in a systematic effort to generate business in Iowa. *See Pemberton v. OvaTech, Inc.*, No. 81-1024 (8th Cir. Jan. 13, 1982). In this regard, the following comment by the United States District Court for the Southern District of New York, made in a case very similar to this, is noteworthy:

> "The fact that physical contacts are minimized through the use of independent contractors and distributors does not alter the basic existence of a defendant's involvement in, and its pecuniary benefit from, a full exploitation of the market."

Ladd v. KLM Royal Dutch Airlines, 456 F.Supp. 422, 425 (S.D.N.Y. 1978).

While the court considers the application of the first three *Caesar's World* factors to be dispositive, it notes that the fourth factor, which involves the interest of the state of Iowa, is also pertinent. As noted in *Pemberton*, the forum state's interest in providing a forum for its injured residents is neither insignificant nor absent. No. 18-1024, at p. 14. In addition to the interest of Iowa, in a case such as this where the only available United States venue lies in a single district, the United States itself has an interest in seeing that plaintiff is provided a forum in this country. *Aigner v. Bell Helicopters, Inc.*, 86 FRD 532 (N.D. Ill. 1980).[7]

Cayman and Holiday Inn also seek a dismissal for forum non conveniens. That this court has the inherent power to refuse jurisdiction over a case where the interests of justice require that the suit be brought in a foreign country is well accepted. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Reyno v. Piper Aircraft Co.*, 479 F.Supp. 727, 730 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3rd Cir. 1980), *rev'd*, 102 S.Ct. 252 (1981). Moreover, the determination to refuse jurisdiction is committed to this court's sound discretion. *Gilbert*, 330 U.S. at 511-12. When an alternative foreign forum has jurisdiction to hear the case, and when trial in the chosen forum would establish "oppressiveness and vexation" to a defendant out of all proportion to plaintiff's convenience, or when the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems, the court may, in its discretion, dismiss the case. *Piper Aircraft, 102 S.Ct. at 258 and 266 n.23.*

The analysis of this question begins with the understanding that there is a strong presumption in favor of the plaintiff's choice of forum, especially where the plaintiff has chosen the home forum. *Id.*, at 265-66. As the Court in *Piper Aircraft* noted, "[w]here the home forum has been chosen, it is reasonable to

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[7]The last factor identified in *Caesar's World*, the convenience factor, is not dispositive of defendant's motion challenging minimum contacts. It receives considerable attention, however, in the ensuing consideration of the claim of forum non conveniens.

assume that this choice is convenient." *Id.*, at 266. The resident plaintiff's forum choice is not dispositive, however, for the balance of conveniences may disfavor plaintiff's forum and justify dismissal. To guide the trial court's exercise of discretion in this regard, the Supreme Court has provided a list of "private interest factors" affecting the convenience of the litigants and a list of "public interest factors" affecting the convenience of the forum. *Gilbert*, 330 U.S. at 508-09. The private interest factors are: (1) relative ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; (3) possibility of view of premises, if view would be appropriate to the action; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive. *Id.*, at 508. The public interest factors are: (1) administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies decided at home; (3) the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; (4) the avoidance of unnecessary problems in conflicts of law, or in the application of foreign law; and (5) the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.*, at 509.

The court has considered the parties' arguments and has decided that this question, while close, must be resolved in favor of defendants. Therefore, this action will be dismissed for forum non conveniens.

With regard to the private interest factors, the court notes that virtually all key witnesses reside at Grand Cayman. These witnesses include the person who owns the shop from which the Hobie Cat was rented by Lehman; employees of the sailboat rental shop, including its manager; the person who was in charge of smallboat rental and who was responsible for giving sailing instructions and for checking out people who wanted to rent sailboats with regard to their sailing ability, who instructed Lehman in how to sail the Hobie Cat, and who was one of the last people to see Lehman alive; another person who saw Lehman shortly before his disappearance; the search pilot and various

other persons who were involved in the search for Lehman, including several police officers; and an employee of Cayman who has knowledge of the relationship between Holiday Inn and Cayman and between Cayman and the sailboat rental shop.In addition to these witnesses, defendants indicate that they would also call as witnesses the Brownsville, Texas, U.S. Coast Guard Commander of the cutter that found the Hobie Cat and two Cayman employees, one of whom lives in Memphis, Tennessee, and one who lives in Miami, Florida.

Plaintiff represents that she is aware of two witnesses with knowledge of the weather conditions on the day of Lehman's disappearance, and that these persons reside in Iowa and Kansas. Also, she indicates that both she and her son plan to testify. Lastly, she asserts that there are Iowa resident competent to testify as to the sailing characteristics of a Hobie Cat

The court considers the first and third private interest factors, the relative ease of access to sources of proof and the possibility of viewing the premises, respectively, not to play a significant part in the analysis of the propriety of dismissal on convenience grounds. This is not the kind of case, for example, in which it is necessary to offer into evidence the wreckage of an airplane or helicopter or voluminous business records. *See Piper Aircraft*, 102 S.Ct. at 259; *Pain v. United Technologies Corp.*, 637 F.2d 775, 786-87 (D.C. Cir. 1980). Similarly, the court does not feel that a view of the area in which Lehman was sailing would be necessary.

The consideration of the second private interest factor and of a factor covered by the fourth private interest category, however, clearly leads the court to the conclusion that dismissal is proper and warranted. First, defendants have available to them no compulsory process for attendance of witnesses who live at Grand Cayman, who are not citizens of this country, and who are unwilling to voluntarily appear at a trial of this action before this court. *Pain*, 637 F.2d at 786-90; *see* FRCP 45; 28 USC § 1783. And to the extent that such persons would agree to appear, the cost to defendants of their appearance would be substantial. On

the other hand, if trial is held at Grand Cayman, the only witnesses plaintiff would have to reimburse would be her son and herself. This court is sensitive to plaintiff's claim of economic hardship, *see Phoenix Canada Oil Co., Ltd. v. Texaco, Inc., 78 FRD 445, 453 (D.Del. 1978),* but the court believes that it would be relatively more severe to require defendants to bear the expense of a trial in Iowa.

Second, and perhaps most important, if trial is held in this district and not at Grand Cayman, defendants will be unable to implead Bob Soto's Diving Ltd. *Piper Aricraft,* 102 S.Ct. at 267-68; *Pain,* 637 F.2d at 790-91. Defendants' primary defense to this action appears to be that the responsible party, if any, is Bob Soto's Diving Ltd. While it is true, as plaintiff argues, that defendants could proceed against Bob Soto's in a separate indemnity action, the court feels that the more "expeditious and inexpensive" course would, be for all claims and issues to be disposed of in one action. *Piper Aircraft,* 102 S.Ct. at 267-68.

The analysis of the public interest factors also points towards dismissal. First, the forum with the more significant "local interest" is Grand Cayman, the locality of Lehman's death. *Id.,* 102 S.Ct. at 208; *Pain,* 637 F.2d at 792-93. Second, under Iowa's conflict of laws rules, *Zeman v. Canton State Bank,* 211 NW2d 346 (Iowa 1973) ("most significant relationship" test), it is more than likely that the substantive law of Grand Cayman controls this action. If that is the case, it is desirable that the trial of this dispute take place at Grand Cayman and not here. *Piper Aircraft,* 102 S.Ct. at 268 N.29; *Pain,* 637 F.2d at 793-95.[8]

The court is convinced that the interests of convenience require the dismissal of this action. Other than the possibility of increased expense, the court is aware of no prejudice to plaintiff from being required to proceed at Grand Cayman. In this regard, the court notes that defendants have submitted the affidavit of

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[8]The court recognizes that the first and fifth public interest factors weigh in plaintiff's favor. The court does not view this contribution as substantial, however.

Paul Joseph Valentine Dougherty, an Attorney-at-Law licensed to practice in the Cayman Islands, British West Indies. There, Dougherty indicates that defendants are subject to jurisdiction of the Cayman Court and are admissible to service of process in that court, that the cause of action alleged by plaintiff in this action is cognizable under Cayman law, that Cayman law provides for the recovery of exemplary damages for more than simple negligence, that Cayman law provides that an estate may recover for death and that the decedent's dependents may recover their lost support, and, lastly, that Cayman law, allows an action for indemnity and contribution. Based upon these assertions, and also on defendants' agreement to submit to the jurisdiction of the Cayman court and to waive any statute of limitation defense if suit is commenced within one year after the dismissal of this action, *id.*, the court is convinced that dismissal of this action is required.

It is therefore
ORDERED
GRANTED.
March 4, 1982

/s/ Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT